KHK Advertising Sdn Bhd v Siera Management Sdn Bhd (in liquidation)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(W)-1441–08 OF 2014
ALIZATUL KHAIR, ABANG ISKANDAR AND IDRUS HARUN JJCA
15 MARCH 2018

Companies and Corporations — Winding up — Petition — Plaintiff granted permanent stay of winding up order — Whether winding up proceedings brought and continued in bad faith, maliciously and with ulterior motive of damaging plaintiff's business — Whether winding up order terminated in plaintiff's favour — Material date of assessment — Whether relevant — Whether winding up order obtained with reasonable and probable cause — Whether there was malicious prosecution — Companies Act 1965

The appellant ('the defendant') had commenced an action against the respondent ('the plaintiff') at the sessions court for the sum of RM76,500, being monies due and payable by the plaintiff to the defendant for the services rendered by the defendant at the plaintiff's request. Judgment in default was entered against the plaintiff for the said sum. The defendant filed an application for judgment debtor summons ('JDS') to be issued against the directors of the plaintiff. The court ordered the judgment debtor ('the JD') to make monthly payments. The defendant later served the plaintiff a notice under s 218 of the Companies Act 1965 ('the CA') notice and filed a winding up petition against the plaintiff. The High Court ordered the plaintiff to be wound up. However, the plaintiff was granted a temporary stay of the said winding up order for a period of one year. The plaintiff filed a second application for stay under s 243 of the CA seeking, inter alia, a permanent stay of the winding up order. The plaintiff filed this suit against the defendant contending that the defendant had maliciously and without reasonable or probable cause, caused the plaintiff to be compulsorily wound-up under the s 218 notice. Alternatively, the plaintiff contended that the winding up proceedings were brought and continued by the defendant in bad faith, maliciously and with the ulterior motive of damaging the plaintiff's business. The court granted the plaintiff a permanent stay of the said winding up-order. The plaintiff sought for damages to be assessed for the loss and damage it had suffered as a result of the said winding up order. The court then ordered that damages be assessed and be paid to the plaintiff, the damages to be restricted to the three heads of damages for malicious prosecution. Hence the present appeal on the grounds that the judge erred in finding that: (a) the said winding up order terminated in the plaintiff's favour; (b) the material date of assessment was 14 July 2011; (c) the said winding up order was obtained without

reasonable and probable cause; and (d) there was malice. The plaintiff cross-appealed against the judge's decision not to allow the plaintiff to raise the issue of tort of abuse of process on the grounds that it had not been pleaded and was raised for the first time during submission.

Held, allowing the appeal and dismissing the cross-appeal:

(1) Where there is a decision of the court, the decision needs to be reversed in favour of the party who alleges malicious prosecution before that party can say that the proceedings terminated in his favour. In the present case, where a winding up order has been made against the company (the plaintiff) the only way it could be said that proceedings have terminated in favour of the plaintiff is if the winding up order was reversed in favour of the plaintiff. To contend otherwise would mean that a malicious prosecution claim tantamounts to an informal appeal against a winding up order. It was not in evidence before the High Court nor was it established that the winding up order was reversed upon appeal in favour of the defendant. In this regard the learned High Court judge clearly erred when she concluded that proceedings had terminated in the plaintiff's favour merely because a permanent stay resulted in a discontinuance of the winding up proceedings. As the plaintiff has not shown that a termination has occurred in its favour, the claim for malicious prosecution against the defendant could not be sustained (see paras 57–59, 62 & 67).

(2) The justification for the tort of malicious prosecution was based on a company maliciously and without reasonable cause being said to be unable to pay his debts before being able to show that the accusation against him was false. The tort action laid in the malicious prosecution of a winding up petition ie in the initiation of winding up proceedings against a company. It should not be extended to the grant of a winding up order as was done by the judge in this case (see paras 74–75 & 77).

(3) The winding up petition was lodged in respect of the plaintiff's inability to pay its debts following a lack of response to the defendant's s 218 notice. Assessing whether there was a lack of reasonable and probable cause whether on 14 July 2011 or any material assessment date before, must therefore be grounded on whether the defendant could not reasonably be said to believe that the plaintiff was unable to pay its debts and to move the court to compulsorily wind the plaintiff up. Whether the instalment payments ordered under the JDS order had yet to commence at the date of the winding up order was not a relevant consideration in this case. This was because the crux of whether the court will make an order to compulsorily wind up a company would necessarily depend on whether the company was unable to pay its debts (see paras 86–88).

(4) Even if malice could be 'inferred' from a lack of reasonable cause, such inference was only justified if there was an absolute lack of reasonable cause, which was so overwhelming that ill-will and a predominant improper malice could be perceived from it. Without these aggravating factors the mere presence of lack of reasonable cause was not sufficient to suggest malice. The plaintiff did not proffer or adduce any evidence to show spite or improper motive on the part of the defendant in obtaining the winding up order. In the absence of any evidence to that effect it could not be said that the defendant was actuated by malice in obtaining the winding up order against the plaintiff (see paras 94 & 96).

[Bahasa Malaysia summary

Perayu ('defendan') telah memulakan satu tindakan terhadap responden ('plaintif') di mahkamah sesyen bagi jumlah RM76,500, iaitu wang yang terhutang dan perlu dibayar oleh plaintif kepada defendan bagi perkhidmatan-perkhidmatan yang diberikan oleh defendan atas permintaan plaintiff. Penghakiman ingkar dimasukkan terhadap plaintif bagi jumlah tersebut. Defendan memfailkan permohonan sama penghutang terhadap pengarah-pengarah plaintif. Mahkamah memerintahkan penghutang penghakiman ('JD') membuat bayaran bulanan. Defendan kemudian menyerahkan satu notis bawah s 218 Akta Syarikat 1965 ('Akta') kepada plaintif dan memfailkan petisyen penggulungan terhadap plaintif. Mahkamah Tinggi memerintahkan plaintif digulung. Walau bagaimanapun, plaintif diberi penggantung sementara perintah penggulungan bagi tempoh setahun. Plaintif membuat permohonan kedua bagi penggantungan bawah s 243 Akta memohon, antara lain, penggantungan kekal perintah penggulungan. Plaintif memfailkan guaman ini terhadap defendan atas dakwaan bahawa defendan telah, dengan niat jahat dan tanpa sebab munasabah dan boleh dijangka, menyebabkan plaintif digulung secara wajib bawah notis s 218. Secara alternatifnya, plaintif menghujahkan bahawa prosiding penggulungan dimulakan dan diteruskan oleh defendan dengan niat jahat dan dengan niat terselindung untuk menjejaskan perniagaan plaintif. Mahkamah membenarkan penggantungan kekal perintah penggulungan plaintif. Plaintif memohon agar ganti rugi ditaksir bagi kerugian dan kerosakan yang dialami akibat perintah penggulungan. Mahkamah seterusnya memerintahkan ganti rugi ditaksir dan dibayar kepada plaintif; ganti rugi terhad pada tiga tajuk ganti rugi bagi pendakwaan niat jahat. Oleh itu rayuan ini atas alasan bahawa hakim terkhilaf dalam memutuskan: (a) perintah penggulungan ditamatkan berpihak pada plaintif; (b) tarikh material taksiran ialah 14 Julai 2011; (c) perintah penggulungan diperoleh tanpa sebab munasabah dan boleh dijangka; dan (d) terdapat niat jahat. Plaintif merayu balas terhadap keputusan hakim untuk tidak membenarkan plaintif membangkitkan isu tort salah guna proses atas alasan ini tidak diplidkan dan dibangkitkan buat kali pertama semasa penghujahan.

Diputuskan, membenarkan rayuan dan menolak rayuan balas:

(1) Jika ada keputusan mahkamah, keputusan itu perlu diakas untuk memihak pada pihak yang membuat dakwaan pendakwaan dengan niat jahat sebelum pihak tersebut boleh menyatakan bahawa prosiding itu ditamatkan memihak padanya. Dalam kes ini, apabila satu perintah penggulungan telah dibuat terhadap syarikat itu (plaintif) satu-satunya cara yang boleh dikatakan bahawa prosiding telah ditamatkan memihak pada plaintif adalah jika perintah penggulungan telah diakas memihak kepada plaintif. Untuk menghujahkan sebaliknya akan bermakna dakwaan pendakwaan niat jahat sama dengan rayuan tidak formal terhadap perintah penggulungan. Ia tidak menjadi keterangan sebelum Mahkamah Tinggi dan tidak ditegaskan bahawa perintah penggulungan itu ditolak atas rayuan memihak pada defendan. Sehubungan itu, hakim Mahkamah Tinggi dengan jelas tersilap apabila menyimpulkan bahawa prosiding telah ditamatkan dengan memihak pada plaintif semata-mata kerana penangguhan kekal menghasilkan penangguhan prosiding penggulungan. Memandangkan plaintif tidak menunjukkan bahawa penamatan telah berlaku memihak padanya, tuntutan pendakwaan dengan niat jahat terhadap defendan tidak dapat dikekalkan (lihat perenggan 57–59, 62 & 67).

(2) Justifikasi untuk tort pendakwaan dengan niat jahat adalah berasaskan syarikat dengan niat jahat dan tanpa alasan yang munasabah dikatakan tidak dapat membayar hutangnya sebelum dapat menunjukkan bahawa tuduhan terhadapnya adalah palsu. Tindakan tort terletak pada pendakwaan dengan niat jahat bagi petisyen penggulungan iaitu dalam permulaan proses penggulungan terhadap sebuah syarikat. Ia tidak boleh dilanjutkan kepada pengeluaran perintah penggulungan seperti yang dilakukan oleh hakim dalam kes ini (lihat perenggan 74–75 & 77).

(3) Petisyen penggulungan telah dibuat berkenaan ketidakupayaan plaintif membayar hutangnya berikutan ketiadaan respon terhadap notis s 218. Untuk menilai sama ada terdapat sebab munasabah dan berkemungkinan pada 14 Julai 2011 atau mana-mana tarikh penilaian material sebelum ini, mesti dibuktikan sama ada defendan tidak boleh dikatakan percaya plaintif tidak dapat membayar hutangnya dan untuk berhujah di mahkamah memaksa plaintif digulung. Sama ada bayaran ansuran yang diperintahkan bawah perintah JDS belum dimulakan pada tarikh perintah penggulungan bukan pertimbangan yang relevan dalam hal ini. Ini kerana perkara utama sama ada mahkamah akan membuat perintah untuk menafikan syarikat semestinya bergantung pada sama ada syarikat tidak dapat membayar hutangnya (lihat perenggan 86–88).

(4) Sekalipun niat jahat dapat 'disimpulkan' daripada ketiadaan sebab munasabah, kesimpulan itu hanya dibenarkan jika tiada sebab munasabah, yang terlalu besar hinggakan niat jahat boleh disimpulkan

daripadanya. Tanpa faktor-faktor yang memburukkan ini ketiadaan sebab munasabah tidak cukup untuk mencadangkan niat jahat. Plaintif tidak mengemukakan apa-apa keterangan untuk menunjukkan tidak bermoral atau tidak wajar pihak defendan dalam memperoleh perintah penggulungan. Tanpa apa-apa keterangan bagi ini, tidak dapat dikatakan bahawa defendan digerakkan oleh niat jahat dalam mendapatkan perintah penggulungan terhadap plaintif (lihat perenggan 94 & 96)]

Notes

For cases on petition, see 3(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 1801–1973.

Cases referred to

American International Assurance Bhd v Coordinate Services L Design Sdn Bhd [2012] 1 MLJ 369, CA (refd)
Anne Lim Keng See v The New Staits Times Press (M) Bhd & Anor [2008] 3 MLJ 492, CA (refd)
Brian Gibbs and others v John Mitchell Rea [1998] AC 786, PC (refd)
Bynoe v Governor and Company Of The Bank Of England and Williams. [1902] 1 KB 467, CA (refd)
Chao Yan San v Yuen Ten Soo [2000] MLJU 260; [2000] 3 AMR 3057, HC (refd)
Glinski v McIver [1962] AC 726, HL (refd)
Govindji J Khona v K Damodaran and Ors AIR 1970 Ker 229, HC (distd)
Gregory v Portsmouth City Council [2000] 1 All ER 560, HL (refd)
Hicks v Faulkner (1878) 8 QBD 167 (refd)
Johnson v Emerson and Sparrow (1871) LR 6 Exch 329 (refd)
Malaysian Assurance Alliance Bhd v Comsa Properties Sdn Bhd & Another Appeal [2011] 7 CLJ 942, CA (refd)
Rawther v Abdul Kareem [1966] 2 MLJ 201, FC (refd)
Semesta Insurance Underwriting Agency Sdn Bhd v Koperasi Insurance (M) Bhd and another suit [2011] 3 MLJ 379, HC (refd)
Sita Ram v Bhim Sen (1902) ILR 24 All 363, HC (refd)
The Quartz Hill Consolidated Gold Mining Company v Eyre (1883) 11 QBD 674, CA (refd)
Tims v John Lewis & Co [1951] 2 KB 459, CA (distd)
Vijayalakshmi Devi d/o Nadchatiram v Jegadevan s/o Nadchatiram & Ors [1995] 1 MLJ 830, CA (refd)
Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152, SC (refd)

Legislation referred to

Companies Act 1965 ss 218, 218(2), (2)(a), 243, 253
Debtors Act 1957 s 8

Appeal from: Suit No 22NCVC-1323–10 of 2015 (High Court, Kuala Lumpur)

Khoo Guan Huat (Melissa Long with him) (Skrine) for the appellant.
Mohd Izral Khairy (Izral Partnership) for the respondent.

Alizatul Khair JCA:

INTRODUCTION

[1] This is an appeal by the appellant against the decision of the learned High Court judge who had allowed the respondent's claim for malicious prosecution against the appellant.

[2] The respondent had also filed a cross-appeal against the decision of the learned judge who had dismissed their claim for the tort of abuse of legal process.

[3] At the conclusion of the hearing of the appeal and cross-appeal, we allowed the appeal and dismissed the cross-appeal with costs of RM50,000 here and below to the appellant and ordered that the deposit be refunded.

[4] In this judgment the appellant and respondent will be referred to as the defendant and plaintiff respectively.

[5] We set down below the reasons for our decision.

BACKGROUND FACTS

[6] The facts leading to the filing of this suit are largely undisputed and are as follows.

[7] The defendant had commenced an action against the plaintiff in the Sessions Court of Kuala Lumpur for the sum of RM76,500 being monies due and payable by the plaintiff to the defendant for services rendered by the defendant at the plaintiff's request.

[8] On 1 April 2010 judgment in default was entered against the plaintiff for RM76,500 together with interest and costs ('the said JID').

[9] Pursuant to obtaining the said JID, the defendant filed on 24 June 2010, an application for judgment debtor summons ('JDS') to be issued against the directors of the plaintiff, namely Mohamad bin Adam and Mohd Shamil bin Mohd Yusoff.

[10] The JDS against Mohd Shamil was subsequently withdrawn on 13 June 2011.

[11] The JDS came up for hearing on 23 June 2011 and 29 June 2011 wherein Mohamed bin Adam was present. After examination by the court an order was made on 29 June 2011 for the judgment debtor to make monthly payments. The first instalment payment was due on 30 August 2011.

[12] On 28 January 2011, the defendant served on the plaintiff a s 218 notice.

[13] On 10 March 2011, the defendant filed a winding up petition against the plaintiff at the High Court in Shah Alam.

[14] On 14 July 2011, the Shah Alam High Court ordered the plaintiff to be wound-up ('the said winding up order').

[15] On 24 October 2011, the plaintiff was granted a temporary stay of the said winding up order for a period of one year.

[16] On 23 October 2012, the plaintiff filed a second application for stay under s 243 of the Companies Act 1965 seeking, inter alia, a permanent stay of the said winding up order.

[17] Also on 23 October 2012, the plaintiff filed this suit (the subject matter of the present appeal) against the defendant contending that the defendant had maliciously and without reasonable or probable cause, caused the plaintiff to be compulsorily wound up under s 218 of the Companies Act 1965 on or about 14 July 2011.

Alternatively, the plaintiff contended that the winding up proceedings were brought and continued by the defendant in bad faith, maliciously and with the ulterior motive of damaging the plaintiff's business rather than furthering any legitimate interest of the defendant and/or without probable cause.

[18] On 21 November 2012 a temporary stay of the said winding up order was ordered by consent of all parties pending the disposal of the plaintiff's application for a permanent stay.

[19] On 2 May 2013, the court granted the plaintiff a permanent stay of the said winding up order upon the plaintiff paying the official receiver the sum of RM53,000, being the balance sum due and owing by the plaintiff to the defendant under the said JID.

[20] The plaintiff sought for damages to be assessed for the loss and damage it had suffered as a result of the said winding up order.

THE HIGH COURT DECISION

[21] The learned judge found at the conclusion of the trial that the plaintiff had succeeded in proving, on a balance of probabilities, its claim for malicious prosecution.

[22] Her Ladyship then ordered that damages be assessed (together with interest and costs) and be paid to the plaintiff, the damages to be restricted to the three heads of damages for malicious prosecution as laid down in the English Court of Appeal case of *The Quartz Hill Consolidated Gold Mining Company v Eyre* (1883) 11 QBD 674.

THE DEFENDANT'S (APPELLANT) SUBMISSION

[23] The learned judge erred in finding that the plaintiff had proved on a balance of probabilities, its claim for malicious prosecution against the defendant.

[24] According to the defendant, based on the House of Lords decision in *Gregory v Portsmouth City Council* [2000] 1 All ER 560, (*Gregory*) to succeed in a claim for malicious prosecution, a plaintiff must prove the following:

(a) that the law was set in motion against him on a criminal charge;

(b) that the prosecution was determined in his favour;

(c) that it was without reasonable and proper cause; and

(d) that it was malicious.

[25] It was also opined by Lord Steyn in the aforesaid case that the tort of malicious prosecution is not generally available in civil proceedings and has only been extended to certain specific instances in the civil context, most notably the malicious prosecution of a winding up order or a petition in bankruptcy (see also *Johnson v Emerson and Sparrow* (1871) LR 6 Exch 329 and *The Quartz Hill*).

[26] It was the defendant's submission that each and every element must be proven before a case of malicious prosecution can be successfully established (see *Chao Yan San v Yuen Ten Soo* [2000] MLJU 260; [2000] 3 AMR 3057).

[27] The defendant raised four grounds of appeal. Essentially, it was alleged that the learned judge erred in finding that:

(a) the said winding up order terminated in the plaintiff's favour (first ground); A

(b) the material date of assessment was 14 July 2011 (second ground);

(c) the said winding up order was obtained without reasonable and probable cause (third ground); and B

(d) there was malice (fourth ground).

The said winding up order terminated in the plaintiff's favour (first ground)

The learned judge failed to appreciate that each and every stay of the said winding up order, viz: C

(i) the temporary stay of the said winding up order for a period of one year obtained by the plaintiff on or around 24 October 2011 (para 5 of the amended statement of claim); and/or

(ii) the temporary stay of the said winding up order obtained by the plaintiff on or around 21 November 2012; and/or D

(iii) the permanent stay of the said winding up order obtained by the plaintiff on or around 2 May 2013,

did not amount to a termination in favour of the plaintiff. E

The material date of assessment (second ground)

The learned judge erred in holding that the material date to assess (malicious prosecution) was 14 July 2011, that is, the date the said winding up order was obtained instead of 28 January 2011, the date the s 218 notice was served on the plaintiff and/or any other date prior to 14 July 2011, as the tort of malicious prosecution lies in the initiation of proceedings, ie the date of the prosecution of the petition for winding up. F

The said winding up order was obtained without reasonable and probable cause (third ground) G

The learned judge erred in concluding that the said winding up order obtained on 14 July 2011 amounts to malicious prosecution notwithstanding Her Ladyship's earlier finding that the filing of the winding up petition by the defendant was with reasonable cause. H

Further, even if the relevant date of assessment was 14 July 2011, the learned judge failed to appreciate that in the circumstances, the securing of the said winding up order on 14 July 2011 was with reasonable cause; and I

There was malice (fourth ground)

The learned judge's finding that the defendant had maliciously caused the compulsory winding up of the plaintiff without reasonable and probable cause, was erroneous in the absence of any evidence of malice.

Alternatively, even if there was no reasonable cause for the said winding up order to be obtained on 14 July 2011, there was no evidence of malicious intent and/or no circumstances warranting a finding of malice on the part of the defendant.

THE PLAINTIFF'S (RESPONDENT) SUBMISSION

[28] In response to the grounds of appeal raised by the defendant, the plaintiff submitted as follows.

The first ground

On this ground the plaintiff contended that the effect of the temporary stay of one year obtained by the plaintiff on 24 November 2011 and subsequently the permanent stay order on 2 May 2013, was to terminate the winding up proceedings in favour of the plaintiff. Reliance for this proposition can be found in the following excerpt from *Chan & Koh's Company Law* (p 9049/4):

> The effect of an order to stay proceedings under the winding up order altogether after winding up order has been made is a total discontinuance or termination of the winding up proceedings.

Learned counsel for the plaintiff also relied on the case of *Vijayalakshmi Devi d/o Nadchatiram v Jegadevan s/o Nadchatiram & Ors* [1995] 1 MLJ 830, where the Court of Appeal expressed a similar view to the following effect:

> A winding up order could not be discharged or rescinded after it had been made. The only remedy is to apply for a stay of proceedings under the winding up order. The effect of an order to stay proceedings under the winding up order altogether after a winding up order had been made is a total discontinuance or termination of the winding up proceedings.

The second and third ground

It was the plaintiff's submission that the defendant, having compromised the debt pursuant to the order of court dated 29 June 2011 (there being no appeal) and being aware that the first payment would only be due on 30 August 2011, had no reasonable and probable cause thereafter to proceed to procure the said winding up order against the plaintiff.

[29] In support, the plaintiff referred to Hawkin J's definition of reasonable and probable cause as laid down in the case of *Hicks v Faulkner* (1878) 8 QBD 167:

> An honest belief in the guilt of the accused based upon a full conviction, *founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any prudent and cautious man, placed in the position of the accuser*, to the conclusion that the person charged was probably guilty of the crime imputed.

[30] Applying the aforesaid definition, learned counsel for the plaintiff contended that any prudent and cautious man placed in the position of the defendant would not have proceeded to wind up the plaintiff on 14 July 2011 knowing that the debt in question had been subsumed by virtue of the 29 June 2011 order.

[31] As to the material date of assessment, the plaintiff conceded that at the time of the presentation of the s 218 notice, the 29 June 2011 order did not exist and therefore the defendant had a right to proceed to wind up the plaintiff.

[32] However it was the plaintiff's view that after the 29 June 2011 order was made the defendant was no longer justified in proceeding with the winding up of the plaintiff.

[33] For this proposition the plaintiff relied on the English Court of Appeal case of *Tims v John Lewis & Co* [1951] 2 KB 459 and the Indian case of *Govindji J Khona v K Damodaran and Ors* AIR 1970 Ker 229.

[34] In the case of *Tims v John Lewis & Co*, the plaintiff referred to the passage in which Lord Goddard CJ made the following observation:

> But we have listened to an interesting argument, strongly pressed by Mr Duncan, in which, as I understand it, he contended, first of all — and I think very likely he is right on this point-that, although you may have reasonable or probable cause for bringing a prosecution, you may receive information or discover facts while the prosecution is pending, or is continuing, which show that you in fact have no reasonable or probable cause for continuing the prosecution. It is quite easy to imagine a case in which a person was thoroughly justified in bringing proceedings, and then in the course of the case something comes to light which show the prosecution to be in fact groundless. Then if the prosecutor insists on continuing the prosecution without at any rate informing the court of the facts which he has since discovered, he will, I think, possibly have no reasonable or probable cause for continuing the prosecution and at any rate will be guilty of malice.

[35] The aforesaid principles were applied by the Kerala High Court in India in *Govindji* as would appear from the following passage:

> 24. At the commencement a prosecution may not be malicious. But it may become malicious at a later stage when the defendant had no reasonable and probable cause

for continuing the prosecution. Thus if during the pendency of a criminal prosecution the defendant gets positive knowledge of the innocence of the accused from that moment onwards the continuance of the prosecution is malicious. Street says as follows at p 412 of his book on *Law of Torts* (1955 Ed): 'Although the defendant has properly commenced proceedings, if, during their continuance, he learns of facts which do not justify him in carrying on with them, he is liable if he proceeds with the suit'.

[36] The contention of the plaintiff was that having been fully aware and having known of the existence of the 29 June 2011 order, the defendant had, from that day onwards, no longer any basis to instruct its solicitors to apply for a winding up order against the plaintiff.

[37] This was because the 'debt had in effect been compromised' in that under the 29 June 2011 order the first instalment was only due on 30 August 2011. The plaintiff was therefore not in default of any outstanding payment at the time the winding up order was applied for.

The fourth ground

The plaintiff contended that the learned judge was correct in finding that there was malice on the part of the defendant when she concluded as follows:

I concur with the plaintiff that from 29 June 2011 the plaintiff was innocent as the debt had been compromised and was only due on 30 August 2011. Notwithstanding the order of the Sessions Court, the defendant through PW2 had proceeded to give instructions to its solicitors to wind up the plaintiff. *This is malice*. (Emphasis added.)

[38] According to the plaintiff the evidence of malice can be inferred from the learned judge's finding of fact that the defendant had acted without reasonable and probable cause in obtaining the winding up order. Learned counsel relied on the Indian case of *Sita Ram v Bhim Sen* (1902) ILR 24 All 363 and *The Quartz Hill* for this proposition of law.

[39] In *Sita Ram*, the Allahabad High Court explained the circumstances under which the absence of reasonable and probable cause may lead to an inference of malice in the following terms:

6. Now the mere absence of reasonable and probable cause does not of itself justify the conclusion, as a matter of law, that an act is malicious. It is not identical with malice; but malice may, having regard to the circumstances of the case, be inferred from it. Whether malice should be inferred from the want of reasonable and probable cause or not, is a question which depends upon the circumstances of each case. In most cases of the kind the whole question will turn, as was said by the Madras High Court in *Gajpathi Rau v Narsingh Rau Garu* (1871) 6 Mad HC Rep 85 on the cogency of the inference to be derived from the absence of reasonable and

probable cause, the best test for which is partly abstract and partly concrete. Was it reasonable or probable cause for any discreet man? Was it so to the doer of the act? If these questions are answered in the negative, the inference of malice would appear to be irresistible.

[40] In *The Quartz Hill*, the English Court of Appeal in considering whether there was sufficient evidence of malice to go before the jury in a suit for malicious prosecution filed by the plaintiff company pursuant to a petition for wind up, had this to say:

> But the plaintiffs might have relied upon other facts; and it appears probable that the defendant in presenting the petition to wind up the company was actuated, not by desire to benefit the shareholders, but by an indirect motive, namely, a wish to get back the money paid by him to get the shares. This would be evidence to go to the jury. The defendant might have met it in various modes, nevertheless there was evidence of malice to be considered by the jury, even if it consisted only of want of reasonable and probable cause.

[41] The plaintiff further contended that the defendant's malice is apparent when one considers the following:

(a) the defendant proceeded to obtain the winding up order on 14 July 2015 despite the same debt being compromised on 29 June 2011;

(b) by obtaining the winding up order it is clear that the defendant had an indirect motive to pressure or force the plaintiff to pay the debt by way of a lump sum payment; and

(c) if the defendant was bona fide in its action, it would have instructed its solicitors to withdraw the petition upon the debt being compromised on 29 June 2011.

OUR FINDINGS

[42] As pointed out by learned counsel for the plaintiff and as observed by Lord Steyn in *Gregory* under English law the tort of malicious prosecution is not, at present generally available in respect of civil proceedings, it being primarily utilized against criminal proceedings. It was only admitted in a civil context in a few special cases, in particular for abuse of legal process and the malicious presentation of a winding up order or petition in bankruptcy.

[43] In view of the limited and narrow scope in which a tort of malicious prosecution can be brought in a civil proceeding, the burden placed on the plaintiff is a fairly onerous one. The court when hearing a claim for malicious prosecution has to weigh carefully the interest of the plaintiff on the one hand and the defendant's right to institute proceedings on the other.

[44] As stated in *Clerk and Lindsell on Torts* (18th Ed) at paras 16–01:

> in relation to malicious prosecution the interests of the claimant must be weighed against the defendant's right to institute proceedings if he does so with the honest intention of protecting his own, or the public interest, or if the circumstances are such that whatever the defendant's own motives there are good grounds for instituting a prosecution.

[45] The principles set out in *Gregory* (see para 24 above) and *Clerk and Lindsell* were applied by our courts in *Semesta Insurance Underwriting Agency Sdn Bhd v Koperasi Insurance (M) Bhd and another suit* [2011] 3 MLJ 379 where Ramly J (as he then was) held that:

> To be actionable as a tort the action taken by the defendant must have been without reasonable and probable cause, must have been instituted or carried on maliciously and have been terminated in the plaintiff's favour. The plaintiff must also prove damage.

[46] His Lordship went on to hold that in the present case, *Semesta* must prove the following ingredients in order to establish its claim for malicious prosecution on MCIS:

(a) the sessions court action and the winding up proceedings against Semesta has commenced and terminated in favour of Semesta;

(b) there is malice on part of MCIS in instituting those action/proceedings;

(c) there is an absence of reasonable and probable cause; and

(d) Semesta as the plaintiff must have suffered damage.

[47] In the present case, the learned judge in her grounds of judgment concurred with the aforesaid proposition of law when she held that the elements laid down in *Semesta* were 'requisite elements to be proved by a plaintiff alleging malicious prosecution'.

[48] A similar view was held by Richard Malanjum J (as he then was) in the earlier case of *Chao Yan San v Yuen Ten Soo* [2000] MLJU 260; [2000] 3 AMR 3057, where he held that in order to succeed in an action for malicious prosecution each ingredient must be proved and 'not by inference of the others or any of them upon proof of one ingredient'. His Lordship relied on Thompson LP's pronouncement in *Rawther v Abdul Kareem* [1966] 2 MLJ 201 where the latter enunciated that in an action for malicious persecution 'the plaintiff must prove at least five things and unless he does so he cannot succeed. He must prove that the defendant set the criminal law in motion against him. He must prove that the criminal proceedings against him terminated in his favour, that the defendant had no 'reasonable and probable cause' for setting the law in motion against him and that the plaintiff was actuated by malice in

the sense that he had a motive other than only to carry the law into effect. And for historical reasons (the action was originally in case) he must prove damage'. A

[49] In the present case, learned counsel for the defendant contended that the learned judge came to an erroneous conclusion when she found that the plaintiff had successfully proven the tort of malicious prosecution when four crucial elements of the tort (as set out in para 46 above) had not been made out (see *Gregory*, *Semesta* and *Chao Yan San*). B

[50] These four elements constitute the four grounds of appeal of the defendant which we will address below. C

The said winding up order terminated in the plaintiff's favour (first ground)

[51] Essentially the plaintiff's argument was that the effect of the temporary order obtained by the plaintiff on 24 November 2011 and the permanent stay obtained subsequently on 2 May 2013 was to terminate the winding up proceedings in favour of the plaintiff. D

[52] The learned judge concurred with the plaintiff's submission and held that 'the winding up proceeding did in fact terminate in favour of the plaintiff as the effect of an order to stay proceedings under the winding- up order altogether after a winding up order has been made is a total discontinuance or termination of the winding up proceedings ...'. E

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[53] Her Ladyship relied on the following authorities to support her finding:

(a) the Court of Appeal decision in *American International Assurance Bhd v Coordinate Services L Design Sdn Bhd* [2012] 1 MLJ 369;

(b) *Chan & Koh's Company Law*; and G

(c) the Court of Appeal decision in *Vijayalakshmi Devi*.

[54] Having considered both the plaintiff's and defendant's submission on this issue, we were of the view that the learned judge misdirected herself in law when she made the above finding. H

[55] To reiterate, to sustain a claim for malicious prosecution it is imperative that a plaintiff prove that there was termination of proceedings in favour of the plaintiff (see *Semesta*). As explained by the English Court of Appeal in *Bynoe v Governor and Company Of The Bank Of England and Williams.* [1902] 1 KB 467, this ingredient is necessary so that the court hearing the malicious prosecution is not converted into an appellate court of the previous proceedings. I

[56] In the words of Collins MR:

> There is, however, one broad principle lying at the root of the whole matter, to which we drew attention during the argument — namely, that, as long as a conviction stands, 'no one against whom it is producible shall be permitted to aver against it' ... in a modern case, *Basebe v Matthews* ... Byles J said: I think we should be disturbing foundations if we were to admit that there is any doubt that the criminal proceeding must be determined in favour of the accused before he can maintain an action for a malicious prosecution. If this were not so, almost every case would have to be tried over again upon its merits ... This doctrine is as old as the case of *Vanderberg v Blake* (2) ... Montague Smith J was of the same opinion, and cited the judgment in the case of *Castrique v Behrens* (3) in which Crompton J said: 'There is no doubt, on principle, and on the authorities, that an action lies for maliciously and without reasonable and probable cause setting the law of this country in motion to the damage of the plaintiff, though not for a mere conspiracy to do so without actual legal damage ... But in such an action it is essential to shew that the proceeding alleged to be instituted maliciously and without probable cause has terminated in favour of the plaintiff, if from its nature it be capable of such a termination. The reason seems to be that, if in the proceeding complained of the decision was against the plaintiff, and was still unreversed, it would not be consistent with the principle (1) on which law is administered for another court, not being a Court of Appeal, to hold that the decision was come to without reasonable and probable cause. (Emphasis added.)

[57] In other words, to extrapolate from the above pronouncement, where there is a decision of the court, the decision needs to be reversed in favour of the party who alleges malicious prosecution before that party can say that the proceedings terminated in his favour.

[58] In the present case, where a winding up order has been made against the company (the plaintiff) the only way it can be said that proceedings have terminated in favour of the plaintiff is if the winding up order was reversed in favour of the plaintiff.

[59] To contend otherwise would mean that a malicious prosecution claim tantamounts to an informal appeal against a winding up order.

[60] The scheme of the Act itself allows an aggrieved party to appeal against a winding up order under s 253 of the said Act (see *American International Assurance Bhd v Coordinate Services L Design Sdn Bhd* [2012] 1 MLJ 369 (CA) and *Malaysian Assurance Alliance Bhd v Comsa Properties Sdn Bhd & Another Appeal* [2011] 7 CLJ 942).

[61] It was not in evidence before the High Court nor was it established that the winding up order was reversed upon appeal in favour of the defendant.

[62] In this regard the learned High Court judge clearly erred when she concluded that proceedings had terminated in the plaintiff's favour merely because a permanent stay results in a discontinuance of the winding up proceedings.

[63] With respect, Her Ladyship was misconceived when she relied on the case of *American International Assurance* to support her conclusion. That case did not rule that a permanent stay determines the winding up proceedings in favour of the defendant as that was not the issue before the court.

[64] The actual issue before the court was the effect of a stay of proceedings and the validity of any agreement entered into by the company following the winding up order made by the court.

[65] The Court of Appeal in the aforesaid case held that 'a stay order takes effect from the date of the pronouncement of the order and not backdated to the date of the winding up order. A stay order does not wipe the winding up order out of existence but would only be operative from the date of the granting of the stay order. Therefore the question of validating all dealings and agreements entered into after the date of the winding up until the date of the stay order … does not arise at all'.

[66] The Court of Appeal in effect ruled that a winding up order operates prospectively and not retrospectively. In other words 'a stay does not have retrospective effect to annul the effective operation of the winding-up order during the period prior to the stay'. As a stay does not have retrospective effect in that it does not reverse or annul the operation of a winding up order against the plaintiff from the date the winding up order was made a stay is not therefore a termination (of proceedings) in favour of the plaintiff.

[67] We concur with learned counsel for the defendant that as the plaintiff has not shown that a termination has occurred in its favour, the claim for malicious prosecution against the defendant cannot be sustained.

The material date of assessment (second ground)

[68] As regards the *second ground*, that is, the material date of assessment, the learned judge held that the material date to assess whether there was malicious prosecution on the part of the defendant is 14 July 2011, the date the winding up order was granted and not 28 January 2011, the date the s 218 notice was served on the plaintiff as contended by the defendant.

[69] Her Ladyship in her judgment reasoned as follows:

> I am of the view that the material date should be 14 July 2011. The defendant had reasonable cause for prosecuting the winding up on 28 January 2011. However, on 14 July 2011 the defendant instead of withdrawing the petition proceeded to obtain the order notwithstanding the fact that on 29 June 2011, the sessions court had already issued its order for instalments by one of the contributors pursuant to the JDS filed by the defendant.

[70] The learned judge considered the date the winding up order was granted, as the material date to assess because, notwithstanding the fact that the sessions court had on 29 June 2011 issued its order for payment by instalments by one of the plaintiff's contributories, the defendant nevertheless proceeded to obtain the winding up order on 14 July 2011. In other words by 29 June 2011, the debt was compromised and the defendant had no longer any reasonable cause for proceeding to obtain the winding up order on 14 July 2011 (see para 19 of the grounds of judgment).

[71] Her Ladyship relied on the case of *Tims v John Lewis* in support of her finding.

[72] On this issue we agreed with learned counsel for the defendant that the learned judge erred in holding that 14 July 2011 is the material date for assessment. As explained by the learned authors in *Clerk and Lindsell on Torts* 'An action lies in respect of the injury to reputation caused by maliciously and unreasonably *commencing* liquidation proceedings against a company or bankruptcy proceedings against an individual' (paras 16–43). (Emphasis added.)

[73] An action for malicious prosecution therefore lies in respect of the malicious presentation of the winding up presentation of the winding up petition. Lord Steyn's judgment in *Gregory* explains the rationale behind the tort action against the malicious presentation of winding up petitions and demonstrates why the material date of assessment is not the date of the winding up order. At p 566 of the report Lord Steyn observed as follows:

> In *Quartz Hill Consolidated Gold Mining Co v Eyre* Brett LJ (at p 684) justified the rationale of this special case on the ground that the defendant is 'injured before he can shew that the accusation made against him is false; he is injured in his fair name, even though he does not suffer a pecuniary loss'. He drew a contrast (at pp 684–685): 'It is not like an action charging a merchant with fraud, where the evil done by bringing the action is remedied at the same time that the mischief is published, namely, at trial'.

[74] As apparent from the above observation the justification for the tort of malicious prosecution is based on a company maliciously and without

reasonable cause being said to be unable to pay his debts before being able to show that the accusation against him is false.

[75] In this regard the reliance placed by the learned judge on the case of *Tims v John Lewis* to support her finding that the material date (of assessment) is the date the order of winding up was granted is, with due respect, erroneous as *Tims* concerns a claim for criminal malicious prosecution arising from the (allegedly) wrongful imprisonment of the plaintiffs in respect of a charge which was subsequently withdrawn. The case before us relates to the malicious prosecution of a winding up petition.

[76] Similarly with the case of *Govindji* which was referred to by learned counsel for the plaintiff in his submission. It concerns a claim for criminal malicious prosecution.

[77] It is important to bear in mind that as confirmed by the case of *Gregory* the tort of malicious prosecution was only extended to the civil context in special cases. The House of Lords in *Gregory* stressed that it was undesirable and unnecessary to extend the established circumstances of malicious prosecution as any apparent injustice arising from any unwarranted civil proceeding are either already sufficiently protected under other torts or capable of being addressed by any necessary and desirable extensions of the torts.

[78] Consequently we concur with defendant's learned counsel's submission that the tort action lies in the malicious *prosecution* of a winding up petition ie in the initiation of winding up proceedings against a company. It should not be extended to the grant of a winding up order as was done by the learned judge in this case.

Third ground

[79] Following from the above the material date to assess whether there was reasonable and probable cause is the date when proceedings were initiated on 28 January 2011 and not the date of the winding up order. In this regard the learned judge at para 19 of her grounds of judgment found that the defendant was justified in initiating the winding up proceedings. In view of that the defendant had reasonable and probable cause to commence proceedings and the plaintiff's claim therefore cannot be sustained.

[80] Even if it can be argued that the material date for assessment of malice and/or want of reasonable cause is 14 July 2011, ie the date of the winding up order, we agreed with learned counsel for the defendant that the winding up order was obtained with reasonable cause.

[81] The absence or lack of reasonable and probable cause must be proven independent of the other ingredients. It cannot be inferred from the absence of malice (see *Glinski v McIver* [1962] AC 726).

[82] As to what amounts to reasonable and probable cause, the case of *Hicks v Faulkner* (1878) 8 QBD 167 defines it as follows:

> I should define reasonable and probable cause to be, an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.

Rawther v Abdul Kareem cited with approval the above dicta.

[83] In her judgment the learned judge held that there was no reasonable cause for the defendant to proceed to obtain the winding up order on 14 July 2011. In Her Ladyship's view due to the JDS order 'from 29 June 2011, the plaintiff was innocent as the debt had been compromised and was only due 30 August 2011' (para 20 of the grounds of judgment).

[84] The learned judge's reasoning is, with respect flawed as Her Ladyship failed to appreciate the nature and rationale of such winding up proceedings.

[85] Firstly, s 218 of the Companies Act 1965 provides the circumstances under which a compulsory winding up order may be ordered by the court:

> Section 218 Circumstances in which company may be wound up by Court
>
> (1) The Court may order the winding up if —
>
> (e) *the company is unable to pay its debts* (Emphasis added.)

It is also expressly provided under s 218(2) that:

> A company shall be deemed to be unable to pay its debts if — (a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred ringgit then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorized requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor.

[86] The winding up petition was lodged in respect of the plaintiff's inability to pay its debts following a lack of response to the defendant's s 218 notice. Assessing whether there was a lack of reasonable and probable cause whether on 14 July 2011 or any material assessment date before, must therefore be grounded (bearing the guidance of *Hicks v Faulker* in mind) on whether the

defendant could not reasonably be said to believe that the plaintiff was unable to pay its debts and to move the court to compulsorily wind the plaintiff up.

[87] Whether the instalment payments ordered under the JDS order had yet to commence at the date of the winding up order is not a relevant consideration in this case. This is because the crux of whether the court will make an order to compulsorily wind up a company would necessarily depend on whether the company was unable to pay its debts.

[88] In this regard it was reasonable for the defendant to have moved the court to do so on 14 July 2011 for the following reasons:

(a) the notes of the JDS proceedings indicated that the plaintiff did not possess funds to cover its debts (see *RR*, *Jld* 1, pp 91–92);

(b) on the evidence, the petition and the relevant cause papers were in order as at the date of the winding up hearing. Therefore there was reasonable cause both on the statutory presumption under s 218(2)(a) ie in law and in fact that the plaintiff was unable to pay its debts;

(c) further the plaintiff had done nothing in the winding up proceedings itself to overcome the statutory presumption that it was unable to pay its debts or to show that it was commercially solvent; and

(d) additionally under s 8 of the Debtors Act 1957 an order for payment of instalments under a judgment debtor summons does not extinguish the underlying debt. Section 8 provides that an order for payment of instalments under a JDS is no bar to proceedings in execution. Even if winding up proceedings may not be execution per se, s 8 shows that the debt is current and existing notwithstanding any order for instalment payments. This means that the indebtedness of the company is not compromised.

Fourth ground

[89] The fourth element which the plaintiff needs to prove in a tort action for malicious prosecution is malice.

[90] In *Anne Lim Keng See v The New Staits Times Press (M) Bhd & Anor* [2008] 3 MLJ 492 the Court of Appeal defined malice in the following terms:

> What is malice? According to *Osborn's Concise Law Dictionary* (7th Ed) the word 'malice' means:
>
> > Ill-will or evil motive: personal spite or ill-will is sometimes called actual malice, express malice, or malice in fact. In law an act is malicious if done intentionally without just cause or excuse. *So long as a person believes in the truth of what he says and is not reckless, malice cannot be inferred from the fact that his belief is*

A *unreasonable, prejudiced or unfair* (*Horrocks v Lowe* [1972] 1 WLR 1625). Malice in the law of tort is a constituent of malicious prosecution, defamation, malicious falsehood, and conspiracy. But an act otherwise legal is not made wrongful by an improper motive (Mayor of *Bradford v Pickles* [1985] AC 587).

B **[91]** Similarly the case of *Brian Gibbs and others v John Mitchell Rea* [1998] AC 786 states that:

> Malice in this context has the special meaning common to other torts and covers not only spite and ill-will but also improper motive. In the present context the requirement of improper motive would be satisfied by proof of intent to use the process of the court for granting a warrant for a purpose other than to search in the permitted circumstances.

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Thus an improper motive needs to be a predominant improper motive for malice to be established.

D

[92] The learned judge erred when she inferred the presence of malice from a finding of want of reasonable cause (see para 20 of the grounds of judgment). As held by the court in *Chao Yan San v Yuen Ten Soo* [2000] MLJU 260; [2000] 3 AMR 3057 malice should not be simply inferred from lack of reasonable cause.

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[93] The case of *Sita Ram*, cited by learned counsel for the plaintiff, a decision of the Allahabad High Court, expressed similar sentiments on this issue when it stated, inter alia, as follows:

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> Now the absence of reasonable and probable cause does not of itself justify the conclusion, as a matter of law, that an act is malicious.
>
> Whether malice should be inferred from the want of reasonable and probable cause or not, is a question which depends upon the circumstances of each case. In most cases of the kind the whole question will turn, as was said by the Madras High Court in *Gajpathi Rau v. Narsingh Rau Garu* (1871) 6 Mad HC Rep 85 on the cogency of the inference to be derived from the absence of reasonable and probable cause ...

G

H **[94]** Even if malice could be 'inferred' from a lack of reasonable cause, such inference is only justified if there is an absolute lack of reasonable cause, which is so overwhelming that ill-will and a predominant improper malice can be perceived from it. Without these aggravating factors the mere presence of lack of reasonable cause is not sufficient to suggest malice.

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[95] The English case of *Quartz Hill* another case referred to by the plaintiff can be distinguished as there the court found sufficient evidence of malice to be considered by the jury.

[96] In the present case, the plaintiff did not proffer or adduce any evidence to show spite or improper motive on the part of the defendant in obtaining the winding up order. In the absence of any evidence to that effect it cannot be said that the defendant was actuated by malice in obtaining the winding up order against the plaintiff.

CONCLUSION

[97] For the reasons stated above we found that the learned judge was plainly wrong in fact and in law in holding that the plaintiff had succeeded in establishing the tort of malicious prosecution against the defendant.

[98] We therefore allowed the appeal with costs and set aside the learned judge's decision.

CROSS-APPEAL

[99] The plaintiff cross-appealed against the learned judge's decision not to allow the plaintiff to raise the issue of tort of abuse of process on the grounds that it had not been pleaded and was raised for the first time during submission.

[100] We found no reason to interfere with the learned judge's finding. As pointed out by learned counsel for the defendant, a plain reading of the amended statement of claim would show that the issue of abuse of process was not at all alluded to, let alone pleaded. The tort of abuse of process is a separate cause of action and it is trite that the issue should be separately pleaded and not merely raised in submission (see *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152).

[101] The cross-appeal was therefore dismissed with costs.

[102] For completeness it should be mentioned that the plaintiff had initially cross-appealed against the learned judge's finding that the plaintiff is only entitled to claim for 'three heads of damage for malicious prosecution as laid down in *The Quartz Hill Consolidated Gold Mining Company v Eyre* [1883] 11 QBD 674'. However at the outset of the hearing of the appeal learned counsel informed the court that they would not be proceeding with this ground.

A *Order accordingly.*

Reported by Afiq Mohamad Noor

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